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## A COMEDY OF ERRORS IN WHICH APPLICATION OF THE TERMS OF AN APPEALS STATUTE FIGURES.

We think it not wholly uninteresting from a general view to speak of the trials and tribulations in Missouri courts over a statute continuing from the very start of its jurisprudence, that is to say, decision on the question began in 1834 and the courts are still wrestling with the intricate (sic) problem involved.

The statute is one regarding appeals from justices' courts to the circuit court. A matter of this kind, involving mere procedure, ought to present no very great difficulty, but rulings on rulings have appeared in the grist of decision, and now the question goes to the Supreme Court of the state in its superintending province to allay conflicts with itself and between subordinate Courts of Appeal of the state. Will it settle the question? *Nous verron.*

The statute in question provides, among other things, that, when appeal is taken from a judgment in a justice's court, it may be taken on the same day the judgment is rendered, by filing an affidavit that it is not taken for mere vexation or delay and by executing a recognizance according to a statutory form. If appeal is not taken on the day judgment is rendered, it must be taken within ten days of such rendition and notice in writing served on the appellee "stating the fact that an appeal has been taken from the judgment therein specified." Around these quoted words controversy has revolved and continues to revolve.

By one of its Courts of Appeals in 1886 it was ruled that calling defendant "C. C.," stead of "J. J.," Taylor, as he should have been called, was insufficient in a notice. McGinnis & Co. v. Taylor, 22 Mo. App. 513. In 1889 stating in notice that judgment was rendered on June 21st instead of June 4th, the actual day of rendition, was held not to specify the judgment. Hammond v. Kroff, 36 id. 118. But a notice not stating in whose favor judgment was rendered, being otherwise correct, was held sufficient. Holschen Coal Co. v. Railroad, 48 id. 578. And in 1895 notice correctly describing a judgment but not so as to show it was the one against main or garnished defendant or one taxing costs was held fatally bad. Drug Co. v. Hill, 61 id. 680. And where "Henry Baer" was defendant and the notice was signed "J. Henry Baer," this was thought bad. Stone v. Baer, 92 id. 231.

At the start in 1834, to the Supreme Court, intermediate courts not then being in Missouri, a garnishee appealed and described himself as defendant. This was said to be fatal for not describing the cause. Tiffin v. Millington, 3 Mo. 118. That case appears quite radical enough to justify all that followed in all of its variety. But all the intermediate courts could not, so to speak, stand for it.

In Cooper v. Accident Co., 117 Mo. App. 423, one court of appeals followed Hammond v. Kroff, but the court which rendered that judgment could not abide it. Collier v. Moving Co., 128 id. 113. This case was approved in Reinhardt Grocery Co. v. Rust, 185 id. 279.

Now on July 3, 1917, comes this same court and re-establishes the Hammond-Kroff case. Davenport Vinegar & P. Works v. Shelley, 196 S. W. 1035, the ruling being by a majority and dissent asking that the case be certified.

On this last case the variance between the notice and the judgment was in saying the judgment was rendered October 21st instead of October 26th and for "$203.62" instead of "$203.90."

Besides the Collier and Reinhardt cases there are a number of cases refusing to follow the Hammond-Kroff case and among them Swift & Co. v. Baldwin, 185 S. W. 551, which the dissenting judge cites for his justification in asking that the ghost of

literal construction be laid, in so far as it is being made to walk in the daylight of a code state, which aims at substance and not at shadows.

There is no pretense in any of these cases that there was any misleading of appellees. They were on the ground objecting and thereby admitting that they could not proceed with execution against appellant in the lower court. If their position of no notice was correct, they had the right to mandamus the justice's court to issue execution. When they appeared in the upper court and wished to dismiss the appeals, inferentially they admitted their effect as appeals. So to admit they seem to us to give themselves away. If they had notice enough to move in the matter, why was that not enough notice in the taking of the appeals?

But what we particularly wish to call attention to is the long enduring and, apparently, just as rampant, a controversy as when it first began, in a simple thing like procedure in a court where pleadings, practice and procedure are wholly informal. The very fact, that no notice whatever is required where appeal is taken the same day implies that the party who is to be appellee is to keep his eye on the case for at least ten days within which appeal may be taken. Any attempt to proceed in the justice's court, that is arrested, is brought presumptively to his knowledge, but out of caution merely the statute requires a formality. This idea is enforced by the fact that though appeal must be allowed within ten days, notice that it has been allowed need only be given within ten days before the court to which appeal is taken begins its term. This seems more a notice signifying intention to persist in the appeal than a notice of its having been taken. It notifies that appellant has not abandoned his appeal and appellee is thus advised so that he may prepare for trial. But why let the statute's hidden meaning,

> "Like a worm i' the bud,
> Feed on the damask cheek"

of ladies and gentlemen of the Missouri bar?

## NOTES OF IMPORTANT DECISIONS.

CHARITIES—INCULCATION OF PATRIOTISM IN FOREIGN COUNTRY A CHARITABLE PURPOSE—It makes greatly for comity among nations, that a will in this country containing a devise to an institution in Norway for the inculcation of patriotism to that country is valid to show a charitable purpose. And it, further, is tribute to liberality that an international fame like that of Ole Bull is held to aid in defining the charity. This is the effect of a recent decision by Massachusetts Supreme Judicial Court. Thorp v. Lund, 116 N. E. 946.

The devise in this case was to the "Ole Bull Fund Committee of Bergen" in trust, of a fund "for the purpose of preserving, maintaining and making improvements upon Lysoen, Norway, the home of my father, Ole Bull, as a memorial to his memory."

The trustee claimed the right to appoint the fund to the Ole Bull Fund Committee. The court said: "That committee is established by royal charter in Norway to administer the surplus moneys collected for the Ole Bull monument and not needed for that purpose and such augmentations as may come by gift or otherwise, the income of which is to be applied directly or by accumulations to the distribution of donations to younger musicians, actors and actresses, holding engagements with the National Stage of Bergen—a national theater of Norway. It was founded by Ole Bull. It is devoted to the fostering of a national and patriotic spirit. It presents plays and music, the authors of which, and the actors and musicians performing which, must be Norwegian. * * * The Brigade Band, members of which are eligible to the benefits of the fund, is a part of the national army of Norway. * * * It is distinctly associated with the name of Ole Bull. * * * The proposed appointment satisfies every requirement of the trust instrument in being a public charity, national and philanthropic in nature, closely associated with the name of Ole Bull."

In another part of the opinion Ole Bull is spoken of as having been a "distinguished violinist" and "intensely patriotic." "His devotion to his native country and his zeal for her welfare were widely known. It was his earnest ef-

fort and unflagging purpose to arouse and stimulate among his fellow countrymen a spirit of devotion to Norway and to secure for her the position and recognition among nations which he felt was her due." There is more along this line in connection with the raising of money for a monument to Ole Bull in a public square in Bergen.

This opinion deserves notice at this stage in world history. It shows, that whatever may be the view as between the merits of democratic and monarchial rule, patriotism to a country and the encouragement of ideals of its people are not narrowly viewed by the courts of a democratic nation. The boundlessness of a charitable purpose is like that of charity itself.

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INTOXICATING LIQUORS—SURETIES ON SALOON KEEPER'S BOND AS JOINT TORTFEASORS WITH OTHER DEALERS.—The majority in Strong v. Schaffer, 163 N. W. 1035, decided by North Dakota Supreme Court, hold that the sureties on a saloon keeper's statutory bond may be liable to the wife of a drunken husband upon contract, but not as joint tortfeasors with other sellers of liquor to him.

This holding presents inquiry whether the bond of a saloon keeper runs back of its date as far as measuring damages is concerned and, taking it that it does not, if the court is in error, whether there is joint liability with other sellers of liquor subsequent to its date.

It was said in the dissenting opinion in this case, that the statutory requirement of a bond is "nothing more than an enactment of the previously existing common law rule," and there seems much force in this observation. This being true, it is but an assumption for the majority to say that liability upon a bond rests on contract pure and simple—at least, as not bringing in sureties as joint tortfeasors.

It must be conceded that a statute expressly providing, that sureties on a bond should be come liable in every way as the principal might be, would make them joint tortfeasors, if the principal were a joint tortfeasor with others. What, then, is the purpose of bond, in accordance with the statute, is the criterion.

It seems to us, that the statute seeks to strengthen responsibility, and nothing more. It is not to change in any way liability of the principal from tort to contract. If it has no such purpose, technical considerations, under code systems, at least, should not prevail. It is, however, some stretch of construction to suppose, for example, that, if a saloon keeper, who is bonded, sells liquor to one progressively on the way to becoming a drunkard, his bond is tied back of its inception to those who, previously, as the dissenting opinion says, "cast intoxicating slags, slops and refuse into the life stream of plaintiff's husband, thereby polluting the same with drunkenness." But, if a new entrant into the saloon business has his liability relate back, why should not his bond relate back?

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ATTORNEY AND CLIENT — LIEN ON CAUSE OF ACTION UNDER FEDERAL EMPLOYERS' LIABILITY ACT.—The interesting question whether a state statute giving to an attorney a lien upon a cause of action by his client, applies to a suit under Federal Employers' Liability Act, came up in a recent case decided by Minnesota Supreme Court. It was held that it did. Holloway v. Dickinson, 163 N. W. 791.

In this case there was settlement of the suit brought on the cause of action, and the enforcement of the attorney's lien, as provided by statute, was granted, there being a special verdict in favor of the attorney intervening. It was claimed the lien could not be impressed, because Congress did not attempt to regulate dealings between an employe having the right to sue and others and for the state to do this is to burden interstate commerce.

The court does not very pertinently, as it seems to us, discuss the objection, but it argues that Congress knew that attorneys had to be employed in such cases and that they were entitled to be paid. But this is not saying that Congress agreed that they might contract for a lien on the proceeds of a settlement, which only might be done as to a case brought under state law where a statute thus specifically so provides. Such a statute must be thought applicable only to actions brought under state law. It is special in a particular state, and rights under a federal statute operate uniformly through all the states. It is only permissive that the federal statute allows a federal right to be enforced in a state court.

Furthermore, it seems to us that the right of an employe to recover under the commerce clause is more regulatory than remedial, and this makes a difference. If the state court is given authority to enforce a regulatory provision of federal law, its authority is confined strictly to what it is authorized to do.

## IRRIGATION: PROPERTY IN WATER RIGHTS AND DITCHES.

Irrigation was begun as an expedient to make possible the growing of crops in rainless districts in countries where without it there would be no crop at all. Are we to end by employing it universally—to supplement rain in the regions where we are accustomed to rely on the clouds as being our source of water? Apparently this follows from the findings of a committee of the Chamber of Commerce of the United States, which has just reported that practically all agricultural products can be grown more successfully on irrigated lands than otherwise. More than that, the average production of almost every agricultural product on irrigated lands exceeds that of non-irrigated lands by ten to fifty per cent. According to the committee, of which Archer W. Douglas of St. Louis is chairman, irrigation is the most intensive and highest form of modern, scientific agriculture. Crops are practically assured, and it is even asserted there are few insect enemies because the surrounding desert offers no harbor of refuge nor breeding-place for such pests. To quote a press bureau, sent out by the Chamber of Commerce under the date of November 28, an idea of the growth of the area under irrigation is revealed by the committee in the following figures: Number of farms irrigated in the arid regions in 1889, 54,136; in 1909, 158,713. Number of acres irrigated in the arid regions in 1889, 3,631,381; in 1909, 13,738,486. The total value of crops raised on irrigated land was $181,417, 496 in 1909. At present the area under irrigation is estimated at fifteen million acres, with possibility of increase to fifty million.[1]

If the value of crops is so very great on irrigated land in the arid regions of the west as set out in the above quoted statement of the Chamber of Commerce of the United States, certainly the value of water rights and ditches, which, with the land itself, forms the basis of all this wealth, is very great, and it is the purpose of this article to inquire into the value of these property rights, and of what they consist.

The great controlling principle is, that no one has a right to the water itself, but only its beneficial use, and so the decisions and statutes declare that, the water in a public stream belongs to the public, and the appropriator thereof does not acquire a right to specific water, but only to the right to take therefrom a given quantity for a specified purpose.[2] A party acquires no title to the corpus of the water, but only to its use.[3] A prior appropriator of a vested right in the use of water has a property right in which no court can interfere.[4] At common law the right to the use of water is usufructory merely, so, likewise, under the law of appropriation. Neither at common law nor under the law of appropriation does the proprietor or appropriator own the stream.[5] In a recent California case[6] the court recapitulates the above rules as follows:

"A riparian owner has no right in the corpus of the water, Eddy v. Simpson, 3 Cal. 252, 58 A. D. 408, and running water cannot be made the subject of private ownership. The right to the use of water of a stream carries no specific property in the stream itself, Kidd v. Laird, 15 Cal. 179, 76 A. D. 472."

The court then goes on to state that:

"This is far from saying that the property in the water is vested in the public,

(1) Literary Digest, Dec. 23, 1916, Vol. 53, No. 26.

(2) Snow v. Abalos, N. M., 140 Pac. 1044.

(3) Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059; Sherred v. City of Baker, 63 Ore. 28, 125 Pac. 826.

(4) Salt Lake City v. Salt Lake City Water & Electric Power Co., 24 Utah, 249, 67 Pac. 672.

(5) Salt Lake City v. Salt Lake City Water & Electric Power Co., 28 Utah 441, 71 Pac. 1069.

(6) Palmer v. Railroad Commission of California, 167 Cal. 163, 138 Pac. 997 (Jan., 1914).

either for general use or as property of the state. The doctrine that it is public water or that it belongs to the state because it is not capable of private ownership has no support in the statutes of the state or in any decision of this court. The true reason for the rule that there can be no property in the corpus of the water running in a stream is not that it is dedicated to the public, but because of the fact that so long as it continues to run there cannot be that possession of it which is essential to ownership. It is in this respect similar to the air, which cannot be said to be possessed or owned by any person unless it is confined within impervious walls. One may have the right to take water from the stream, even the exclusive right to do so, but in that case he does not have the right to a specific particle of water until he has taken it from the stream and reduced it to possession. It then ceases to be a part of the stream. Such right to the water of running streams as there is under the law is vested entirely in the several riparian owners along its course. It is subject to the common use of all riparian owners but neither has a specific property in any part of the water while it remains running in the stream. The United States, with respect to the lands which it owns in this state, is a riparian proprietor as to the streams running through such lands. It is only by virtue of that fact that it has any right or power of disposition over the powers thereof. And its right and power in this respect is no greater and no less than any other riparian proprietor."

The above case holds, however, that by the amendment of 1911 to sec. 1410, of the Civil Code, all water or use of water within the State of California is declared to be the property of the people thereof. Laws of 1913, California, c. 586, p. 1017, sec. 11, declare all water or the use of water which has never been appropriated to a beneficial use, to be public waters of the state and subject to appropriation.

In Oregon, a state following the California system, the law is that it is the use of water and not the water itself in which one acquires property in general. Apparent exceptions to this rule are found in the drinking of water, and such other uses as actually change its form and substance so that its identity as water is destroyed; but in the main, it is the use only of water which is subject of property.[6a] In Colorado, it is declared that the water of every natural stream is the property of the public and a priority right to its use is acquired by a diversion and use for irrigation. This priority is a property right and as such is subject to sale and transfer, and the right existed prior to any legislation on the subject,[7] and no one is entitled to have adjudicated a priority for more water than he has actually appropriated nor for more than he actually needs.[8] In Wyoming a water right becomes appurtenant to the land upon which the water is used, and the ditch, water pipe, or other conduit for the water becomes subject to a trust deed upon the land and passes by a sale of the land or on foreclosure of the trust deed, though no mention of water, water right or irrigation ditch is contained in the deed of trust.[9] In California it has been the established law from the beginning that the water right which a person gains by its diversion from a stream for a beneficial use is a private right which is subject to ownership and disposition by him as in the case of other property.[10] And in Idaho an official of the state has no authority to

(6a) Sherred v. Baker City, 63 Ore. 28, 125 Pac. 826.

(7) Fort Morgan Land and Canal Co. v. South Platte Ditch Co., 18 Colo. 1, 30 Pac. 1032; Armstrong v. Larimer County Ditch Co., 1 Colo. App. 49, 27 Pac. 235.

(8) Nichols v. McIntosh, 10 Colo. 22, 34 Pac. 278; Cash v. Thornton, 3 Colo. App. 475, 34 Pac. 268; The Seven Lakes Res. Co. v. New Loveland and Greely Irrigation and Land Co., 40 Colo. 383, 93 Pac. 485.

(9) Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475.

(10) Fair v. California Development Co., 164 Cal. 117, 128 Pac. 21.

deprive a prior appropriator of water and give it to any other person; vested rights cannot in such manner be taken away.[12]

*Water as Real and Personal Property.*—Whether water is to be considered real or personal property seems to be determined in the decisions upon whether the water has been delivered into the pipes of a distributing system, such as the pipes of a city waterworks plant. Thus an Idaho case[13] speaks of water as personal property after it has been taken from a natural stream by the appropriator and confined to his own works; and a Utah case,[14] which declares that water flowing in a natural stream, or in a ditch is not subject to ownership so far as the corpus of the water is concerned, but that water in the pipes in a distributing system is personal property; and to the same effect an early California case.[15] But in a late California case[16] it was held that a right in water which has been delivered into ditches or other artificial conduits for the purpose of conducting the water to land for irrigation is real property; but again, in California, in a still later case,[17] that upon its delivery for household use, water is personal property being then completely severed from the realty.

Ditches and water rights are real estate;[18] and being real estate, and not personal property, an administrator cannot maintain an action of adjudication of ownership.[19] The owner of a water right by purchase or original appropriation may sell the same separate and apart from the land.[20] Water rights appurtenant to land pass by deed to the land unless expressly reserved, or may be treated as personal property and separately conveyed.[21] A grant of the usufruct of the water is a grant in the nature of real estate.[22] A right to have a certain quantity of water flow through a ditch is an easement in the ditch, one annexed to realty, and being a perpetual right, is an incorporeal hereditament descendable by inheritance, and hence a freehold estate.[23]

*Water Rights as Appurtenances to Land.*—Where one appropriated water to irrigate land to which he had no title and another obtained a contract of purchase of such land from its true owner, the water so appropriated by the trespasser did not become appurtenant to the land, and hence did not pass to the latter party under the contract of purchase.[24] However, a rightful occupant of public land can acquire a water right which will become appurtenant thereto, although the land was unsurveyed and he had no legal title when the water right was acquired.[25] A water right appurtenant to and legally incorporated with a homestead is exempt from a forced sale to the full extent that the homestead is exempt.[26] The right of a water consumer under an irrigation ditch is such a property right, although appurtenant to the land on which the water is to be used, as may be segregated from such land and sold for use on a different tract of land under the same ditch.[27]

(12) Lockwood v. Freeman, 15 Idaho 395, 98 Pac. 295.

(13) Boise Irrigation and Land Co. v. Stewart, 10 Idaho 38, 77 Pac. 25, 321.

(14) Bear Lake and River Waterworks and Irrigation Co. v. Ogden City, 8 Utah 494, 33 Pac. 135.

(15) Parks Canal and Mining Co. v. Hoyt, 57 Cal. 44; Heyneman v. Blake, 19 Cal. 595.

(16) Stanislaus Water Co. v. Bachman, 152 Cal. 725, 93 Pac. 858, 15 L. R. A. (N. S.) 359.

(17) Copeland v. Fairview Land and Water Co., 165 Cal. 148, 131 Pac. 119.

(18) Ada County Farmers' Irrigation Co. v. Farmers' Canal Co., 5 Idaho 793, 51 Pac. 990; 16 Idaho 217, 101 Pac. 81.

(19) Travelers' Insurance Co. v. Childs, 25 Colo. 360, 54 Pac. 1020.

(20) Bennett and Twin Falls North Side Land and Water Co., Idaho, 150 Pac. 339.

(21) Fisher v. Bountiful City, 21 Utah, 59 Pac. 520.

(22) Middle Creek Ditch Company v. Henry, 15 Mont. 558, 39 Pac. 1054.

(23) Wyatt v. Larimer and Weld Irrigation Co., 18 Colo. 298, 33 Pac. 144.

(24) Smith v. Logan, 18 Neb. 149, 1 Pac. 678.

(25) Ely v. Ferguson, 91 Cal. 187, 27 Pac. 587.

(26) Fitzell v. Leaky, 72 Cal. 477, 14 Pac. 198; Conant v. Deep Creek, etc., Irr'g Co., 23 Utah 672, 66 Pac. 188.

(27) Hard v. Boise Irr'g and Land Co., 9 Idaho 589.

The right to the use of water for irrigation from an artificial canal cannot be regarded as appurtenant to land technically or at common law.[28] But the same case holds that when the owner of land and water right sells the land in separate parcels to two different persons and by common consent the water right passes to them without formal conveyance thereof, each vendor takes an interest in the water right proportionate to the amount of water previously used on the parcel bought by him. The doctrine that a water right originally applied to specific lands for irrigating can be segregated from the land, sold, and taken out at a different point and applied to a different beneficial use, is utterly repugnant to the idea of water as appurtenant to the land under any circumstances, and, under an allegation—"together with all appurtenances thereto belonging" in a complaint to convey land, plaintiff could not introduce evidence that a water right was included with the land.[29]

A deed conveying land and water rights in which the water rights are described as "one-half interest in a certain ditch," reserves in the grantor the use of one-half the water apportioned by the ditch, whether the entire water right is appurtenant to the land conveyed or not.[30] The right to take water from or across the land is in the nature of an easement in gross, which, according to the circumstances may or may not be an easement annexed or attached to certain land as an appurtenant thereto.[31] Where a deed to land did not specify the particular appurtenant water right alleged to have been conveyed with it, extrinsic evidence was admissible to establish such appurtenant right.[32] To the extent to which a water right existed it was an appurtenance to the land, running with it as a corporeal hereditament.[33]

A water right is an independent right and not a servitude upon some other thing, and is an incorporeal hereditament, being neither tangible nor visible.[34] While a water right is appurtenant to the land on which it is used, it is separable from the land and may be sold independently of the land when by doing so no injury results from the rights of others.[35] The right to receive water for land is an easement appurtenant thereto, under Civ. Code California, Secs. 552, 901, defining the rights of purchasers to use water for irrigation, etc.[36]

*Property in Ditches and Canals.*—The owners of lands irrigated may have rights in water flowing in a ditch though they may have no rights in the ditch itself.[37] The ownership of an irrigation ditch is entirely distinct from the right to divert the water of the stream.[38] The right of way for an irrigating ditch on the public lands of the United States vests only upon the completion of the ditch and upon the compliance on the part of the ditch owner with land laws, customs, etc., although it attaches as the ditch is constructed.[39] To entitle plaintiffs to a judgment in an action to enforce a mechanics'

(28) Bloom v. West, 3 Colo. App. 212, 32 Pac. 846.

(29) Gelwicks v. Todd, 24 Colo. 494, 52 Pac. 788.

(30) Arnett v. Linhart, 2 Colo. 188, 40 Pac. 355.

(31) Smith v. Denniff, 24 Mont. 20, 60 Pac. 398, 81 A. S. R. 408.

(32) Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 Pac. 334.

(33) Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645.

(34) Bennett v. Twin Falls North Side Land & Water Co., 27 Idaho 643, 150 Pac. 336; Prosole v. Steamboat Canal Co., 37 Nev. L54, 140 Pac. 720.

(35) Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475.

(36) Graham v. Pasadena Land & Water Co., 152 Cal. 596, 93 Pac. 498.

(37) Clifford v. Larrien, 2 Ariz. 202, 11 Pac. 397.

(38) McLear v. Hapgood, 85 Cal. 555, 24 Pac. 788; Stocker v. Kirtley, 6 Idaho 795, 59 Pac. 891; McDonnell v. Huffine, 44 Mont. 411, 120 Pac. 792.

(39) Jarvis v. State Bank of Fort Morgan, 22 Colo. 309, 45 Pac. 505.

lien against an irrigating ditch, they must show ownership or an interest in defendants in the land over which the ditch was constructed, and the mere fact that defendants own the ditch and have possession of the land is not sufficient.[40]

*Mutual Ownership of Ditches and Water Rights.*—The dam and ditch of an unincorporated irrigating ditch association is held by its members as tenants in common, and each of them is entitled to sell his interest in the property without the consent of the others.[41] The same irrigating ditch may have two or more priorities belonging to the same or different parties, and two or more persons may divert water through the same headgate for the irrigation of their respective farms, without a surrender, joinder, or merger of their respective priorities.[42] One tenant in common in an irrigating ditch or water right may sue for unlawful interference therein by another tenant.[43] A tenant in common in certain water rights of a ditch for mining purposes, its use for mining having been abandoned and its flow turned into another stream, may recapture and use his proportion of the water for irrigating or other lawful purposes.[44] To constitute a tenancy in common in a water right there must be a right to unity of use of the water, and, if such right is destroyed, the tenancy in common ceases to exist.[45]

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(40) Nelson v. Clerf, 4 Wash. 405, 30 Pac. 716.

(41) Biggs v. Utah Irrigating Ditch Co., 7 Ariz. 331, 64 Pac. 494.

(42) Nichols v. McIntosh, 19 Colo., 34 Pac. 278, and cases cited.

(43) Carnes v. Dalton, 56 Ore. 596, 110 Pac. 170.

(44) Meahee v. Hardonbrook, 11 Mont. 385, 28 Pac. 451.

(45) Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059.

## THE SECURED DEBTS ACT UNCONSTITUTIONAL

The act of the Missouri Legislature relative to Secured Debts,[1] is, in the writer's judgment, unconstitutional. In discussing it, I will, first, call attention to three provisions of the Missouri Constitution, viz:

1. Section 4, Article 10, says that "All property subject to taxation shall be taxed in proportion to its value."

2. By Section 18, Article 10, the State Board of Equalization is required "to adjust and equalize the valuation of all real and personal property among the several counties in the state."

3. Section fifteen of the Bill of Rights forbids "any irrevocable grant of special privileges or immunities."

I shall discuss this act from the point of view of the Missouri Constitution only.

The act applies to certain bonds, notes, debentures or obligations for the payment of money, which it divides into three classes, calls them securities, and makes of them a separate and distinct class of property for the purposes of taxation. Among its intents, as I understand, is to unearth hidden bonds, notes, etc., by inducing their owners to submit them to taxation, by greatly reducing taxes on them. The act fixes the rates on these secured debts, for the general revenue fund of the state, on each $100 of a secured debt, or fraction thereof, as follows, viz: five cents when the debt matures not more than one year from the date of payment of the tax; ten cents when maturity is more than one year and not more than two years distant; fifteen cents when more than two years and not more than three years. Twenty cents when more than three and not more than four years; and twenty-five cents when more than four years.

Counties, cities and incorporated towns may, also, tax them for their respective

(1) Laws of Mo., 1917, p. 539 et seq.

purposes; but, in no case, can the taxes of either of them exceed, in the aggregate, the amount levied for the general revenue fund of the state.

Taxation is on the face value of the secured debt. The tax is discharged by the owner of the debt presenting the instrument representing the debt to the proper officer and paying to him the amount of the tax. Thereupon the officer affixes to the instrument a stamp indicating the amount of the tax and the date of its payment. Stamps are prepared and furnished to the recorders of the counties by the state. On renewed debts, the taxes are the same as on the original instruments. The effect of the payment of the proper taxes on a secured debt is to exempt it from all other and further taxation by the State, counties, cities, towns, school-districts and other legal subdivisions of the state.

An example will, perhaps, best illustrate the procedure of taxation and the unconstitutionality of the act. Take, for instance a secured note for $1,000, dated August 1st, 1917, due more than four years after its date. The present levy for state revenue is eighteen cents on the $100. As far as financial vision can now extend, this levy will not be less during the coming four years. The tax on the secured note will be $2.50 for the four years. Contrast this with taxation on other property real and personal, of the appraised value of $1,000. The tax on $1,000 in value of other property would be $1.80 for the present year and $7.20 for the four years. It is at once seen there is a disparity between discarded debts, of the face value of $1,000, and other property, of the appraised value of $1,000 amounting to $4.70. Such a disparity, indeed, any disparity, between taxation of secured debts and other property at once and thoroughly condemns the act. Where did the legislature get the power to reward hiders of notes etc., if they will obey the law?

A note may be assessed and valued just as other personal property. It may be worth its face value or less, or, if it be gilt-edged and due a long way off, it may bring in the market a slight premium.

The State, by the Secured Debts Act, has attempted to remove secured debts from the functions of the State Board of Equalization and the county assessors.

The act plainly grants special privileges or immunities, which are irrevocable, to the owners of secured debts.

By a little analysis, all can perceive that the act conflicts with the constitutional provisions which I have cited.

Moreover, the act is class-legislation, and, therefore, out of touch with the Constitution. Only a class, the owners of secured debts, can receive the benefits of the act; and this class does not, perhaps, embrace one hundredth part of the population of the state.

D. C. ALLEN.

Liberty, Mo.

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## MASTER AND SERVANT—WRONGFUL DISCHARGE.

### PULLER v. ROYAL CASUALTY CO.

**Supreme Court of Missouri. Division No. 1. June 1, 1917. Rehearing Denied July 2, 1917.**

**196 S. W. 755.**

In a servant's action against his employer for breach of the contract of employment, the burden is on the employer to show that the servant is not entitled to recover the full contract price for the services as damages, as because he earned money after his discharge and before trial, etc.

WOODSON, J. * * * It is insisted that the judgment is excessive, for the reason that the record, as stated, shows that:

**The "plaintiff was discharged March 8, 1911, at which time the alleged contract had two years to run. He brought suit March 16, 1911, eight days thereafter, and claimed the entire salary for the two years' unexpired term of the contract at the full rate, together with interest from the date of the filing of the suit, on the**

theory that, although his salary was payable in monthly installments, the discharge made the entire amount at once due and payable. No allowance was made for earnings of plaintiff during the future period, and it could not be known what the amount of such earnings would be."

We will first consider the question as to the salary, and thereafter the interest. No authority has been cited bearing upon the latter question by counsel for either party. The general practice formerly was for the discharged employe to sue for each month's salary as it matured, or await the expiration of the entire remainder of the period for which he was employed, and then sue for the entire sum which would have been due him under the contract had he not been discharged, with the interest on each monthly installment from the time it became due under the terms of the contract; but where, as here, the suit was brought a few days after the discharge for the entire sum which would have been due him for the remainder of the term, two years, had he not been discharged, quite a different rule should prevail. This is true from the very nature of things; for instance, suppose the defendant had admitted that it discharged the plaintiff without cause, as we have held it did, and had said to him, in good faith, notwithstanding that fact, we will continue to pay to you at the end of each and every month $500, for the period of two years, the balance of your unexpired term, as per the terms of the contract of employment; could it, with any degree of plausibility, much less reason, be contended that plaintiff was entitled to one cent more? I think not; for the obvious reason that in such a case, in so far as his salary is concerned, the contract has not been broken, and the $500 per month for the next two years would be every cent which could possibly become due him under the terms thereof; and, if it be true in this class of cases, as all the authorities hold, that the contract is the measure of the damages to be recovered, then I am at a loss, in the absence of some law authorizing punitive damages of which I have no knowledge, to know upon what principle the entire breach of the contract by the defendant could possibly increase his damages over and above the amount fixed by the contract. The fact that plaintiff was discharged from further work before his term of employment had expired could not certainly increase his damages, for the reason that the clause of the contract requiring of the plaintiff service was placed therein for the benefit of the defendant and not the plaintiff, and if the defendant wrongfully prevented the plaintiff from further performance of those services, then the damages flowing therefrom would naturally fall upon it, and not upon him; consequently, as previously stated, I am unable to see in what possible way he is damaged in a sum larger than that stated in the contract.

Some confusion has arisen as to the measure of damages in such cases, or perhaps, more accurately speaking, to justly administer the damages fixed by the contract, for that is the standard of measurement, although broken by the employer, on account of a desire of the courts to formulate a rule to do speedy justice between the parties, and without requiring the discharged employe, as under the old rule, to resort to the courts at the end of each month, or compel him to await the end of the time of his employment and then sue for the entire sum due him under the contract; that rule proved to be too vexatious and expensive, or too dilatory, resulting in great injustice and hardship in many cases where the employes were unable financially to wait so long.

In order to remedy those evils, the courts, by degrees, evolved the rule permitting the employe to sue upon his unlawful discharge for the amount of wages he would have earned under the contract had he been permitted to fully perform it, and fixed the damages prima facie, at the amount provided for in the contract, and cast the burden upon the employer to show by evidence, if he could, that the former was not entitled to recover the full amount; for instance, if the employe had earned any sum of money after his discharge and before the trial, the employer would be entitled to a credit therefor; but if he failed to make such proof, then the employe would be entitled to recover the full amount stated in the contract. This rule is announced in the following cases: Tenzer v. Gilmore, 114 Mo. 210, 89 S. W. 341; Ross v. Grand Pants Co., 179 Mo. App. 291, 156 S. W. 92; Boland v. Glendale Quarry Co., 127 Mo. 520, 30 S. W. 151.

This rule, at best, is but a makeshift, and in this class of cases, where the suit is brought for the whole amount before the expiration of the term of the employment, it often works great hardship and an injustice upon the employer; for instance, he might be financially able to pay the salary monthly, extending over a period of two years, as provided for by the contract, but wholly unable to pay the entire amount two years in advance of the time provided for therein. Again, the employe might die after the rendition of judgment and before the expiration of his term; or he might procure other employment; in the former case had the suit been brought at the

end of the month or of the term, the employer would only have been liable for the wages up to the date of the employe's death; and in the latter he would have been entitled to a credit for the amount the employe earned during the remainder of the term. But regardless of the origin of this rule, its purpose or wisdom, it is now too firmly embedded in our jurisprudence to justify its eradication; however, it should be limited to its present scope, and not extended as an instrument of greater injustice or to more grievous oppression of the employer. In its enforcement, equity and justice should be done the employer as well as to the employe.

If we apply this rule to the facts of this case in the light of the foregoing observations, then we are clearly of the opinion that the plaintiff was not entitled to interest on the whole amount sued for from the institution of the suit, but only on the monthly installments as they became due under the contract, whether before or after the institution of the suit.

Section 7181, R. S. 1909, prescribing the rates of interest judgments shall bear, has no application to interest on installments not bearing interest, and therefore not existing and not due at the date of their rendition. Such installments should bear 6 per cent interest from and after maturity, whether they mature before or after judgment, and the judgment should so provide.

We are therefore of the opinion that the judgment of the circuit court, to the extent of allowing interest on all sums not due, whether before or after the rendition of judgment, is excessive and erroneous.

The further point is made that since the damages for which the judgment was rendered was composed of monthly installments due and not due at the date of its rendition, the trial court erred in not finding the then "present worth" of those sums not due, according to the life tables, and in not rendering judgment for only the aggregate of the installments then due with interest thereon, and the then "present worth" of those installments not then due. In other words, I understand counsel to contend that the trial court should have deducted from each monthly installment not due at the date of the judgment, a percentage equal to 6 per cent per annum, from that date until due, according to the contract, and then have rendered judgment for an amount equal to the installments then due, with interest, plus those not then due, less said 6 per cent deduction. That contention of counsel, in my opinion, is well founded; it is based upon sound reason and common justice. While it deducts 6 per cent per annum from the monthly installments not due him at date of the rendition of judgment, yet it gives him those portions of his salary before due from one month to many before he could have collected them had the contract not been broken, and had he worked all that time.

For the reasons stated, the judgment is reversed, the cause remanded, with instructions to the circuit court to make the deductions mentioned, due consideration to be given to the time which has since elapsed, and to render judgment for the plaintiff for the balance found by the court to be due him.

NOTE.—*Allowance of Damages for Time After Trial in Suit for Wrongful Discharge of Servant.*—It was ruled in Mt. Hope Cemetery Asso. v. Weidenman, 139 Ill. 67, 28 N. E. 834, that, where a servant's action for compensation is tried before the expiration of the term of employment, "in view of the fact that the servant may die or become incapable of performing before the expiration of the term of his employment, and the uncertainty of the wages or emoluments he may be enabled to earn in the future," he is limited to actual loss at the time of trial. "It must necessarily be that the actual loss of the plaintiff's between the trial and the expiration of the term cannot be definitely determined, and any amount allowed must, from the very nature of things, be largely speculative." But nevertheless the actual loss must be in some way declared.

In Wood's Mayne on Damages, 250, it was said the servant "may not only recover for wages actually earned, but also for his probable loss by being unable to secure equally profitable employment," which is said to be the rule in England, but the author says there is no American case stating a similar rule.

In Stearns v. Lake Shore & M. S. R. Co., 112 Mich. 651, 71 N. W. 148, there was a contract of employment for life. It was said: "The plaintiff was permitted to recover as damages the amount he would have earned up to the time of trial and the present worth of what he would be able to earn in the future, so long as he would, in the ordinary course of events, be able to perform the service, less any sums which he would be able to earn in other employment, the court distinctly stating to the jury that it was the duty of the plaintiff not to lie idle, and that the value of his service in any employment which he could reasonably get should be deducted from the allowance which the jury would otherwise make."

In Brighton v. Lake Shore & M. S. R. Co., 103 Mich. 420, 61 N. W. 550, there was a similar contract to that in the Stearns case. An instruction for prospective damages was held correct where the court similarly spoke about plaintiff's duty not to remain idle.

In Cutter v. Gillette, 163 Mass. 95, 39 N. E. 1010, the trial took place before the contract term had expired. It was said that in estimating plaintiff's damages: "The jury have the right to consider the wages which he would have earned under the contract, the probability whether his life and that of defendant would continue

to the end of the contract period, whether the plaintiff's working ability would continue, and any other uncertainties growing out of the terms of the contract, as well as the likelihood that the plaintiff would be able to earn money in other work during the term."

In Boland v. Glendale Quarry Co., 127 Mo. 520, 30 S. W. 152, recovery for loss up to time of trial less what plaintiff may have earned and up to expiration of term of contract, less "what the jury may believe from the evidence, he will be able to earn between now" and the time of expiration of the term. This was said to be the well-settled rule in Missouri.

Rhoades v. C. & O. R. Co., 49 W. Va. 494, 39 S. E. 209, 55 L. R. A. 170, 87 Am. St. Rep. 826, cites with approval the following from Tennessee Coal & I. R. Co. v. Pierce, 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. 335: "Plaintiff in an action on the contract was entitled to introduce evidence of his age, health, and expectancy of life and if his disability was permanent, to recover the full value of the contract to him at the time of the breach, including all he would have received in the future as well as in the past, if the contract had been kept, deducting, however, any sum that he might have earned already or might thereafter earn."

Many other cases hold as the above do. For example, Wilke v. Harrison Bros., 166 Pa. 202, 30 Atl. 1125; Pritchard v. Martin, 27 Miss. 305; Ennis v. Buckeye Pub. Co., 44 Minn. 105, 40 N. W. 314; Moore v. Central Fdry. Co., 68 N. J. L. 14, 52 Atl. 292. On the whole, therefore, the remark of Mr. Wood, *supra*, seems not borne out at all in decision. These rulings appear to be in exact accord with English decision. C.

## ITEMS OF PROFESSIONAL INTEREST.

### REPORT OF THE MEETING OF THE INDIANA BAR ASSOCIATION.

The Indiana Bar Association met at Indianapolis, July 11th and 12th, 1917.

The president's address was delivered by Mr. Wm. A. Hough, of Greenfield; he spoke in favor of an international court for the establishment of justice among nations. He is opposed to the establishment of international law for the "regulation of war."

"We do not want an international law regulating war," Mr. Hough said. "We want an international law blotting war forever from the face of the earth, and instituting in its stead an international court which shall establish by its decrees justice among nations as our courts do now among individuals."

Mr. Hough called attention to existing international law, which, he said, has done much for humanity, although its weakness lies in the lack of provision of punishment for those nations which violate it. It stands, he said, before the world as the great figure of Justice with her scales, but without her sword.

"The law cannot be enforced," Mr. Hough said, "except by a vigilance committee of the nations or by one or more nations taking up voluntarily the enormous task of endeavoring to police the world."

Mr. Newton W. Gilbert, of New York, formerly of Fort Wayne, also spoke on the subject, "The Eclipse of the Constitution." He referred to the food control bill and other bills pending in Congress to prove that the Constitution, as between friends, can suffer an eclipse when the country is in danger. In other words, there seems to be a police power inherent in the national government as one of its implied powers. Mr. Gilbert sounded a note of warning about the danger of enacting laws that might too far transcend the limitation of the Constitution, but offered no criticism of acts of Congress that have already been passed.

Judge Charles S. Cutting, of Chicago, also spoke, discussing the Adamson Law decision, reviewing both the majority and the minority opinions of the Supreme Court.

Judge Quincy A. Myers, of Indianapolis, formerly of the Indiana Supreme Court, spoke on the subject, "The Constitutional Guaranty of a Republican Form of Government."

The following officers were elected: President, Inman H. Fowler, of South Bend; Secretary, George H. Batchelor, of Indianapolis; Treasurer, Elias D. Salsbury, of Indianapolis.

## CORRESPONDENCE

### THE CONSTITUTION IS THE HIGHER LAW.

*Editor, Central Law Journal:*

I have read with great interest in the recent issues of your Journal a number of communications from scholarly lawyers and students of legal history, showing the unreliability of many assertions of fact which Chief Justice Walter Clark, of the Supreme Court of North Carolina, and others holding similar views, have made in their attacks upon the right of a court to declare void legislative acts violative of the Constitution.

When Judge Clark's premises of fact are thus disproved, of course his conclusions necessarily fall.

Before the argument is closed out in your columns, there is one great name that should be added to the list of those thinkers and statesmen of the earlier formative period of our government, who recognized and declared that the people are entitled under their Constitution to be protected against the acts of legislatures in violation of the Constitution, and that the judiciary was constituted the sworn defender of those rights under the Constitution.

I refer to John C. Calhoun, of South Carolina, one of the most profoundly logical minds among American statesmen, and a special champion of state rights.

Referring expressly to the question whether it was within the power and duty of the Supreme Court to declare void a law that was in violation of the Constitution, Mr. Calhoun, in his famous "South Carolina Exposition" of 1828, said: That such power rested upon an inference, but an "*inference so clear, that no express provision could render it more certain*" —though he did claim in the same connection that such a decision was operative only between the parties to the case, and could not bind a sovereign state.

When Marshall and Calhoun, the two leading expounders of the centralized and decentralized theories of our government, agree on this construction of our Constitution upholding the power and duty of a court to declare void an unconstitutional law, there ought not to be much excuse for other men to doubt and quibble.

Yours truly,

WM. H. FLEMING.

Augusta, Ga.

## BOOKS RECEIVED.

Modern Business Corporations. Including the Organization and Management of Private Corporations, with Financial Principles and Practices; summaries of decisions of the courts elucidating the law of private business corporations, explanation of the acts of promoters, directors, officers and stockholders of corporations and forms of procedure illustrative of the formation, organization, operation and consolidation of corporations. By William Allen Wood, LL. M., of the Indianapolis Bar. Second edition. Price, $4.00. Indianapolis. Bobbs-Merrill Company. Review will follow.

## HUMOR OF THE LAW.

All of his efforts to make the car go proved futile.

"Ding the thing!" he growled. "That agent told me a child could run it."

"Perhaps the agent was right," snapped the traffic cop. "Why don't you hire a child?"

"You insist that the officer arrested you while you were quietly attending to your own business?"

"Yes, your honor. He caught me suddenly by the collar, and threatened to strike me with his club unless I accompanied him to the station house."

"You say you were quietly attending to your own business, making no noise or commotion of any kind?"

"Yes, your honor."

"What is your business?"

"I am a burglar."—Lippincott's.

Not long ago a certain publication had an idea. Its editor made up a list of thirty men and women distinguished in art, religion, literature, commerce, politics and other lines, and to each he sent a letter or a telegram containing this question: "If you had but forty-eight hours more to live, how would you spend them?" his purpose being to embody the replies in a symposium in a subsequent issue of his periodical.

Among those who received copies of the inquiry was a New York writer. He thought the proposition over for a spell and then sent back this truthful answer by wire, collect:

"One at a time."—Saturday Evening Post.

A doctor young in years, one day
Was, as an expert, called to say
What he might know about a case
Of brain "concussion." Now the place
Was filled with people, who came there
To learn or listen, gape or stare;
And Lawyer Brown (for sometimes do
Some lawyers such a course pursue)
Proceeded to attack the knowledge
Of "Pills," who was but late from college.
Said he, "If White (my opposition)
And I should meet in swift collision,
And strike our heads so that we fell,
Would we 'concussion' get? Now tell."
The doctor smiled. Said he, "I might
Predict concussion, sir, for White."

—J. Semple.

## WEEKLY DIGEST

**Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.**

*Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn*



1. **Adverse Possession**—Evidence.—In action to recover land claimed under ten-year statute of limitation, verbally given plaintiff by her father, evidence tending to show that the only claim of ownership to the land was made by her father held not sufficient to show plaintiff's adverse occupation.—Stark. v. Leonard, Texas, 196 S. W. 708.

2.——Statute of Limitations.—In trespass to try title, plaintiff claiming under ten-year statute of limitations, though defendant showed on plaintiff's cross-examination that plaintiff had not paid taxes on any portion of land, that did not show conclusively that plaintiff was not claiming adversely.—Houston Oil Co. of Texas v. Holland, Texas, 196 S. W. 668.

3. **Assignments**—Contract.—Where M. contracted to do defendant's delivery work, and thereafter M. contracted with plaintiff in writing to do such work for it and receive entire consideration, it was not an assignment of the contract so as to give plaintiff right of action against defendant for loss of profits from its refusal to permit him to perform contract.—Reed v. R. M. Chapman Basting Co., Minn., 163 N. W. 794.

4. **Attorney and Client**—Lien.—Attorney for plaintiff has a lien upon a cause of action under federal Employers' Liability Act instituted in state courts, ond in such action the lien may be enforced.—Holloway v. Dickinson, Minn., 163 N. W. 791.

5.——Misconduct.—Attorney, who heard client testify falsely without protest, and participated in attempt to conceal from judgment creditor jewelry belonging to judgment debtor in proceedings supplementary to execution, and claimed privilege when himself interrogated, held guilty of unprofessional conduct, warranting disbarment.—In re Abuza, N. Y., 166 N. Y. S. 105.

6. **Bail**—Collateral Attack.—Final order forfeiting bail bond cannot be collaterally attacked in subsequent action against principal and sureties on bond.—Lawrence v. Mason, Okla., 166 Pac. 133.

7.——Joint Action.—Where bail bond executed by defendants as sureties and their principal was a several obligation, action for a breach may be maintained against defendants without joining the principal.—Ferrero v. State, Okla., 166 Pac. 101.

8. **Bankruptcy**—Amending Schedule.— Proceeding will be reopened to allow bankrupt to amend schedules to include a debt which through misapprehension was scheduled in the name of the wrong party.—In re Adams, U. S. D. C., 242 Fed. 335.

9.——Discharge.—Discharge will be set aside, and case reopened, to allow bankrupt to amend schedules to include a debt which, through misapprehension, was scheduled in the name of the wrong party.—In re Adams, U. S. D. C., 242 Fed. 335.

10. **Banks and Banking**—Bank Commissioners.—Where bank commissioners took over insolvent bank, sold its assets for benefit of depositors' guaranty fund, and authorized purchaser to secure cancellation of stock of bank, and obtain issuance of new certificate to themselves, granting authority to bank to reopen under old name and charter, there was no dissolution of corporation or creation of new one operating to relieve bank from its former debts or obligation.—First State Bank of Oklahoma City v. Lee, Okla., 166 Pac. 186.

11. **Bills and Notes**—Fraud in Procurement.—Fraud in its procurement which will enable maker of a note to avoid payment when in the hands of an innocent holder means fraud on part of holder, and has no reference to contract out of which the instrument arose.—Watson v. American Nat. Bank, Ga., 93 S. E. 38.

12.——Holder in Due Course.—Where notes were given for automobile, and seller of car broke his warranty thereof before he transferred notes to bank, and bank knew of breach, it was not a holder in due course.—Baker State Bank v. Grant, Mont., 166 Pac. 27.

13. **Bridges**—Repairs.—Portion of a public road constituting an abutment to a public bridge is a part of bridge itself, and county is under same obligation to keep it in repair as bridge proper.—Nicholson v. Jackson County, Ga., 93 S. E. 30.

14. **Cancellation of Instruments**—Fraud.—In action to rescind sale of real estate and cancel deeds on ground of fraud, proof that as result of fraud purchaser obtained possession of property and deprived vendor of its revenue for an entire season was sufficient showing of actual damage.—Posey v. Hanson, Texas, 196 S. W. 731.

15. **Carriers of Goods**—Assignment of Cause of Action.—After loss or destruction of property in hands of carrier, assignment by consignee of all its rights on account of tort to consignor will not invest consignor with such title to goods destroyed as to enable him to maintain action in tort therefor.—Lowden v. Merchants' & Miners' Transp. Co., Ga., 93 S. E. 45.

16.——Bill of Lading.—Clause in bill of lading issued by steamship company, that it was agreed that goods were valued at not exceeding $100 per package, and that, unless different value was expressly declared, liability in case of loss should not exceed such amount, etc., was enforceable, though charges were not based on valuation.—Burke v. Union Pac. R. Co., N. Y., 166 N. Y. S. 100.

17.——Bill of Lading.—Bank to which shipper of cotton by shipper's order bills, indorsed and delivered to bank with drafts on purchasers in favor of bank, bank crediting amount of drafts to shipper on books, held to have become vested with title as owner or pledgee.—Hubbell, Slack & Co. v. Farmers' Union Cotton Co., Texas, 196 S. W. 681.

18.——Bill of Lading.—A bank's indorsement, "all prior indorsements guaranteed, pay to any bank or banker or order," upon a draft to which forged bills of lading were attached but which contained no reference thereto, implied no guaranty of the genuineness of such bills.—Downing Co. v. Pearson Banking Co., Ga., 92 S. E. 968.

19.——Connecting Carrier.—In action against connecting carrier for damages to interstate shipment of mules, defendant would be liable for consequences of its negligent failure to observe directions given by plaintiff to unload in certain stockyards.—Chicago, R. I. & G. Ry. Co. v. Jenkins, Tex., 196 S. W. 679.

20.—**Carriers of Live Stock**—Delay.—In suit for shrinkage of cattle shipped, from delay, testimony was admissible of usual time for such shipments, although given by witness who had accompanied only shipment in suit; it appearing he had accompanied shipment between such points over another route, and that the agent routed the shipment in suit upon application for most direct route.—Baker v. Holman, Tex., 196 S. W. 728.

21.—**Carriers of Passengers**—Contract of Carriage.—Relationship of passenger and carrier is one of contract, but where would-be passenger brings himself within requirements entitling him to ask service of carriage, law imposes duty on carrier to render service, and will imply existence of contract of carriage.—Virginia Ry. & Power Co. v. Arnold, Va., 92 S. E. 925.

22.——Negligence.—Where railroad machinist was killed through railroad's negligence while on his way home after end of work for day, his administrator could recover, under St. 1906, c. 463, p. 1, § 63, as amended by St. 1907, c. 382, and St. 1912, c. 354, as to penalty for loss of life through negligence of railroads, etc.—Palmer v. Boston & M. R. R., Mass., 116 N. E. 899.

23.——Pleading and Practice.—To a petition alleging that defendant maintained a "sharp and dangerous curve," so that coach striking it at a dangerous rate of speed lurched and threw passenger from train, special demurrer on ground that description of curve was indefinite should have been sustained.—Central of Georgia Ry. Co. v. Stacer, Ga., 92 S. E. 962.

24. **Certiorari**—Appeal and Error. — Court cannot say that there was error in refusing to permit petitioner in certiorari to further except to answers including everything in knowledge of magistrate, as allegations of petition, not verified by answer of magistrate, could not be considered.—Rice v. Ray & McArthur, Ga., 93 S. E. 43.

25.——Dismissal of Writ.—While it is proper to dismiss a writ of certiorari whereby it was sought to review a void judgment, order of dismissal is invalid in so far as it attempted to give effect to such judgment.—Little v. McCalla, Ga., 93 S. E. 37.

26. **Chattel Mortgages** — Injunction.—Where chattel mortgage was invalid as against creditors, because not refiled in a succeeding year as required by statute, mortgagor's administratrix, in possession and representing creditors whose claims had been adjudicated, might permanently enjoin its enforcement.—Beebe v. Prime, N. Y., 166 N. Y. S. 56.

27.——Priority of Lien.—Lien, acquired by creditor by levy of writ of attachment held superior to lien of chattel mortgage which was not recorded and not accompanied by the required affidavits.—Loosemore v. Baker, Cal., 166 Pac. 26.

28. **Commerce**—Burden on.—State tax on gross receipts, including those derived from interstate commerce, is a burden thereon and invalid.—People ex rel. Commercial Cable Co. v. State Board of Tax Commissioners, N. Y., 166 N. Y. S. 62.

29.——Employes.—Where employe of interstate carrier was engaged in interstate commerce at his death, his conduct in attempting to rescue another person from peril will not destroy the nature of his employment.—Hardy v. Atlanta & W. P. R. Co., Ga., 93 S. E. 18.

30. **Contracts**—Breach.—In action for breach of contract to furnish money to be loaned, that at the time and place demand for loans was "keen" does not show that plaintiff could have loaned the money on the conditions as to nature of security required by the contract.—McCulloh v. Reynolds Mortgage Co., Tex., 196 S. W. 565.

31.——Waiver.—Where party defends action on written agreement for duress, and on trial offers to perform contract, and tenders documents withheld by him, such offer and tender constitute waiver of duress.—Tulsa Rig, Reel & Mfg. Co. v. Arnold, Okla., 166 Pac. 135

32. **Constitutional Law**—Income Tax.—Since "income," used in Const. Amend. 44, giving power to tax incomes, has not only been much discussed by legislators and press in connection with taxation, but is also in everyday use, common meanings attached to word by lexicographers have weight in determining what people meant.—Trefry v. Putnam, Mass., 116 N. E. 904.

33. **Corporations**—Dissolution.—Where sheriff paid execution sale proceeds to corporation's director and treasurer, who distributed them among stockholders, all directors are liable to corporate creditor even if execution sale dis-

solved corporation, since Civ. Code 1912, §§ 2814-2816, continues directors of dissolved corporations as trustees to collect its assets and pay its debts.—American Cotton Oil Co. v. Saluda Oil Mill Co., S. C., 93 S. E. 14.

34.——Estoppel.—Corporation which for number of years intrusted its secretary with general management of its business is, secretary having previously executed notes to obtain funds for corporation, estopped to deny his authority to execute notes sued upon.—Sapulpa Co. v. State, Okla., 166 Pac. 119.

35.——Inspection of Records.—Refusal to permit stockholder to appoint his own agent or attorney to examine records of corporations is in effect denial of right to examine such records. —Pfirman v. Success Mining Company, Idaho, 166 Pac. 216.

36.——Stockholder Liability.—The liability of shareholders of a corporation to contribute the amount of their shares as capital, is ordinarily treated in equity as assets like other legal claims belonging to the corporation.—Mitchell v. Hancock, Tex., 196 S. W. 694.

37.——Stockholders.—Stockholder has no individual interest in profits of corporation until dividend has been declared; accumulation of surplus does not itself entitle stockholders to dividend.—Trefry v. Putnam, Mass., 116 N. E. 904.

38. **Covenants**—Breach.—Although fact that part of land conveyed had been actually appropriated by state, or was about to be, was technically breach of covenant of warranty, as grantee knew at time of conveyance that grantor did not have title, he could not recover more than nominal damages for breach of covenant.—Callanan v. Keenan, N. Y., 166 N. Y. S. 71.

39. **Customs and Usages**—Accounting. — In action for partnership accounting embracing many items, where defendants answered with general denial, and did not challenge any item because of want of authority, admission of evidence of well-settled custom with respect to item was not error.—Rains v. Weiler, Kan., 166 Pac. 235.

40 **Damages** — Consortium. — Compensation for loss by husband of consortium of wife is to be determined, not by direct evidence of its value, but by the jury from their observation, knowledge, and experience.—Elling v. Blake-McFall Co., Ore., 166 Pac. 57.

41. **Death**—Unmarried Son.—An unmarried son earning about $600 annually and living with the family, composed of father, mother and other children, and contributing to the family's common fund, was to be considered as contributing to mother's support.—Seaboard Air Line Ry. v. Deal, Ga., 92 S. E. 947.

42. **Divorce** — Abandonment. — Refusal by wife, granted separate maintenance, of husband's good faith offer of reconciliation and request to return, constitutes abandonment, if continued for statutory period.—Appleton v. Appleton, Wash., 166 Pac. 61.

43. **Eminent Domain**—Compensation.—Damages to land on dry waterway from discharge from city's septic sewer tank, operated under legislative authority, were not taking, damaging, or destroying of property for public use, required by Const. art. 1, § 17, to be adequately compensated, where such discharge did not constitute nuisance.—Brewster v. City of Forney, Tex., 196 S. W. 636.

44. **Estoppel**—Employment. — Employe was estopped from drawing larger salary per month than that shown to be due him by employer's remittance statements by acceptance of payments made him, accompanied by such statements, only if the employer was misled to continue employment beyond term for which it was legally bound.—Norfolk Hosiery & Underwear Mills Co. v. Westheimer, Va., 92 S. E. 922.

45. **Executors and Administrators**—Gratuitous Services.—A child remaining a member of the family after becoming of age is not entitled to pay for services from estate, unless performed pursuant to prior agreement therefor.—Lovell v. Beedle, Minn., 163 N. W. 778.

46. **Exemptions**—Members of Family.—On adoption after father's death, minors not only became members of family of adopting parents, but ceased to be of family of deceased father, so that they ceased to be of classes for which property may be set aside as exempt from execution, widow and family of deceased.—In re Pillsbury's Estate, Cal., 166 Pac. 11.

47. **Factors**—Instructions by Principal. — Merely because factor has advanced money on consignment does not authorize him to wholly disregard the principal's instructions as to sale. —Moody v. Thompson, Okla., 166 Pac. 96.

48. **Fixtures**—Machinery.—In action to recover machinery by plaintiff, who sold it to defendant's mortgagor, defendant's title being derived from foreclosure of chattel mortgage, no question could arise as to fixtures, defendant's right to machinery being unconnected with realty.—Maxson v. Ashland Iron Works, Ore., 166 Pac. 37.

49. **Gas**—Rates.—An order of Corporation Commission requiring natural gas to be furnished to city board of education at a rate less than that charged other consumers is not invalid by reason of discrimination in favor of public schools.—Guthrie Gas, Light, Fuel & Improvement Co. v. Board of Education of City of Guthrie, Okla., 166 Pac. 128.

50. **Injunction**—Discretion.—In suit to restrain sheriff and county attorney from proceeding to seize as intoxicating liquors, beverages manufactured by plaintiff as substitute for intoxicating liquor, denial of the injunction held not abuse of discretion under evidence.—Pabst Brewing Co. v. Johnston, Okla., 166 Pac. 123.

51.——Nuisance.—The building of a gin in a business district will not be enjoined as a nuisance at the suit of owners of residences in the neighborhood, where said property will not be rendered worthless or uninhabitable, and defendants are able to respond in damages.—Strieber v. Ward, Tex., 196 S. W. 720.

52. **Insurance**—Indemnity.—Though contract of indemnity insurance gives insurer exclusive right to control defense of any action against insured for personal injuries, there is implied obligation that insurer exercise good faith.—Brunswick Realty Co. v. Frankfort Ins. Co., N. Y., 166 N. Y. S. 36.

53.——Pleading and Practice.—Conditions in fire policy prescribing time and method of giv-

ing notice of loss, etc., must be complied with, and petition exhibiting policy containing such conditions and not averring compliance is subject to demurrer.—Shawnee Fire Ins. Co. v. Beaty, Okla., 166 Pac. 84.

54.——Policy.—Policy of insurance will be construed most strongly against company.—O'Leary v. St. Paul Fire & Marine Ins. Co., Tex., 196 S. W. 575.

55. **Intoxicating Liquors**—Illegal Sale.—To render licensed saloon keeper liable for an illegal sale, his sale need not be sole cause of intoxication; it being enough if it be a co-operating or proximately contributing cause.—Fest v. Olson, Minn., 163 N. W. 798.

56.——Illegal Storing.—Offense of storing and keeping in possession contraband liquors held not committeed by receiving such liquors, and having them in possession but a moment before they were seized.—State v. Freeman, S. C., 93 S. E. 13.

57.——Indictment and Information.—Indictment under Acts 1915 (Ex. Sess.), p. 91, § 2, alleging that defendant, a minor, had possession of intoxicating liquors, was not demurrable because failing to allege that defendant was intoxicated when he acquired such possession.—Alexander v State, Ga., 92 S. E. 959.

58.——Single Sale.—A single sale will warrant a conviction under an information for keeping and maintaining a common nuisance by keeping a place where intoxicating liquors are sold as a beverage in violation of the prohibiiton law of the state.—Scott v. State, N. D., 163 N. W. 813.

59.——Statutory Construction.—"Intoxicating liquors," as used in prohibitory liquor statutes, denotes an alcoholic liquor, and must contain more than one-half of 1 per cent of alcohol, or be able to intoxicate a human being.—Estes v. State, Okla., 166 Pac. 77.

60. **Landlord and Tenant**—Eviction.—Where a tenant was given privilege of using a garret and access thereto, landlord's action in changing location of stairway was not an eviction, good as defense in action for rent.—Giesen v. Metzler, N. Y., 166 N. Y. S. 114.

61.——Lease.—Nothing is of more value in construing lease inartificially phrased, than construction given it by parties.—D. Ghirardelli Co. v. Students' Express & Transfer Co., Cal., 166 Pac. 16.

62.——Restoration of Premises.—Where lease required landlord, after fire, to restore premises to prior condition out of insurance proceeds, and, on fire occurring, insurance company allowed for loss of panels and stucco work put in by tenant sufficient sum to restore them, landlord was bound to restore them.—Vorenberg v. Wm. Filene's Sons Co., Mass., 116 N. E. 903.

63. **Libel and Slander**—Business or Profession.—If language disparaging property of another also involves imputation upon him in respect to his trade, business, or profession, then the language becomes actionable per se.—Hubbard v. Scott, Ore., 166 Pac. 33.

64.——Evidence.—A lessor of oil lands had no cause of action for slander of title to property or slander of character of property because of statements made by lessee's agent that well drilled on land contained no oil in paying quantities, in absence of a showing that such statement was made to or in hearing of third persons.—Arnold v. Producers' Oil Co., Tex., 196 S. W. 735.

65.——Libel per se.—Publishing fact that charges against minister, without intimation of their import, were read and unanimously sustained at church conference, and that church had withdrawn its fellowship, is not libelous per se.—Nunnery v. Bailey, Okla., 166 Pac. 82.

66. **Mandamus**—Prior Demand.—Before making application for writ of mandate express demand must be made on defendant to perform act sought to be enforced.—Pfirman v. Success Mining Company, Idaho, 166 Pac. 216.

67.——Public Utilities Commission.—Where suit in federal court had not determined the validity of contract between two gas companies, mandamus will issue to require them to continue supply under terms of the contract until legally set aside, unless within fixed time consent to change of terms be obtained from Public Utilities Commission.—State v. Landon, Kan., 165 Pac. 1111.

68.——Remedy at Law.—Mandamus will issue from Supreme Court to compel superior court to perform legal duty when there is not plain, speedy, and adequate remedy at law under specific provisions of Rem. Code 1915, §§ 1014, 1015.—State v. Superior Court, Spokane County, Wash., 166 Pac. 69.

69.——Remedy at Law.—Under Pol. Code, § 2238, as amended by Laws 1911, c. 81, holder of municipal improvement bonds has a speedy and adequate remedy at law to collect principal and interest due from delinquent owners, so that mandamus would not issue against city.—New First Nat. Bank of Columbus, Ohio, v. City of Weiser, Idaho, 166 Pac. 213.

70. **Marriage**—Illegal Relation. — Where a man and woman were not joined by ceremonial marriage, their relations, begun when he has a living wife, were of no force as a public assumption of the marriage relation.—In re Riley's Estate, Mont., 165 Pac. 1105.

71. **Master and Servant**—Instruction by Master.—A master is not responsible for the consequence of bad advice given by a servant whose duties do not include the giving of advice generally.—Jacobson v. Northwestern Pac. R. Co., Cal., 166 Pac. 3.

72.——Notice of Injury.—Oral notice to employer by employe of injury is not "knowledge" of injury, excusing employe's failure to give notice of injury required by Workmen's Compensation Act (St. 1911, c. 751, pt. 2), § 15.—In re Brown, Mass., 116 N. E. 897.

73.——Wages.—In an action to recover fixed sum per month as wages for services as farm laborer in raising hops, plaintiff must prove contract as alleged and cannot recover where it appears that he was to be paid for his labor only out of net proceeds of crops.—John Gong v. Ton Toy, Ore., 166 Pac. 50.

74.——Workmen's Compensation Act.—Where employer, in his report of injuries required by Workmen's Compensation Act, pt. 3, § 18, reports as fact that employe injured himself, and not merely that he claimed injury, such report shows employer's "knowledge" of injury excusing employe's failure to give notice of injury required by pt. 2, § 15.—In re Brown, Mass., 116 N. E. 897.

75.——Workmen's Compensation Act.—Under Workmen's Compensation Law, § 15, where claimant lost only part of hand, leaving thumb and palm normal, award granting compensation for loss of entire hand held error.—Adams v. Boorum & Pease Co., N. Y., 166 N. Y. S. 97.

76. **Municipal Corporations**—Estoppel. — A gas and electric company, which contracted with the mayor to furnish service at certain rates in consideration of his dismissing a suit against the company, and which furnished service at those rates for a number of years, was thereafter estopped to deny the validity of the contract on the ground that it was ultra vires as to the city.—Wackenhut v. Empire Gas & Electric Co., N. Y., 166 N. Y. S. 29.

77. **Perpetuities**—Rule Against.—Gift over to charitable use, which might vest after 21 years after life in being at creation of interest, violated rule against perpetuities, and was void.—In re Penrose's Estate, Pa., 101 Atl. 319.

78. **Principal and Surety** — Bond.—Contractor's surety bond conditioned to pay for all materials, etc., and to perform all conditions of contract and to save beneficiary harmless from claims for materials, etc., was limited to indemnity of obligee, and was not made for benefit of those furnishing materials to contractor. —Standard Gas Power Corp. v. New England Casualty Co., N. J., 101 Atl. 281.

79. **Property**—Possession.—Actual possession of real estate is prima facie evidence of ownership in fee, absent evidence showing a superior title, and is a sufficient proof of title to sustain an action for damage to freehold.—Gillespie v. City of Duluth, Minn., 163 N. W. 799.

80. **Quo Warranto**—Remedy.—Quo warranto would not be the proper remedy by mayor of a city against members of a police commission appointed under an alleged invalid act, where defendants are not exercising duties of an office to which plaintiff claim title.—Lemaire v. Crockett, Me., 101 Atl. 302.

81. **Railroads**—Contract.—In suit for counsel's services rendered a bondholders' committee, where it appeared that contract for services was contract of the committee, and not of defendant railway, and jury found that contract had not been adopted by railway, plaintiffs could not recover.—Weil v. Northwestern Pa. Ry. Co., Pa., 101 Atl. 312.

82.——Contributory Negligence. — Passenger in automobile who did not request driver to stop or take necessary precautions while apwhich purchaser agreed not to manufacture, etc., fluid ink eradicators, or ink eradicators proaching dangerous railway crossing, was imitating seller's product, or put up in similar guilty of contributory negligence barring recovery for personal injury from collision, though no signal was given.—Morris v. Chicago, B. & Q. R. Co., Neb., 163 N. W. 799.

83.——Easement.—Where abutting owner did not own fee in streets, his complaint for maintenance of freight railroad in street must depend on his rights to easemnts of light, air and access.—Stanley v. Jay St. Connecting R. R., N. Y., 166 N. Y. S. 119.

84. **Receiving Stolen Goods**—Indictment and Information.—That the surname of the person from whom defendant was alleged to have received the stolen property was spelled "Espnosa," instead of "Espinosa" held not to render the indictment fatally defective in view of the evidence and the fact that defendant could not have been misled.—Reyes v. State, Tex., 196 S. W. 532.

85. **Sales**—Acceptance.—The signature of defendant's salesman to an order blank, furnished for selling automobiles, and marking the price and the deposit, containing all the terms of the sale, implies an acceptance of the order and a reciprocal agreement to sell.—Moskowitz v. White Bros., N. Y., 166 N. Y. S. 15.

86.——Restrictions.—A sales contract, under boxes, etc., only prohibits purchaser from imitating seller's product.—Bailey v. S. S. Stafford, Inc., N. Y. 166 N. Y. S. 79.

87.——Waiver.—Where buyer refused to receive goods ordered, statement of seller that, if buyer could not use them, he would dispose of them and could do so at better prices, did not waive seller's right to nominal damages.—Centennial Electric Co. v. Morse, Mass., 116 N. E. 901.

88. **Stipulations**—Binding Force.—It is not essential to the validity of a stipulation between the parties that a pending action shall bide the result of another action and be determined thereby that the stipulation be mutually beneficial.—Mitchell v. Hancock, Tex., 196 S. W. 694.

89. **Street Railroads**—Public Use.—The use of a street for street railroad traffic being a public use, though not so used when a bridge over a railroad was constructed, it is the uncompensated duty of the railroad to strengthen the bridge, if necessary to make it fit for use. —City of St. Paul v. Great Northern Ry. Co., Minn., 163 N. W. 788.

90.——Trespasser.—Plaintiff riding on public street on motorcycle not registered as required by Laws 1910, p. 90, and injured by collision with street car, without any suggestion of wantonness, was a mere trespasser, and could not recover.—Knight v. Savannah Electric Co., Ga., 93 S. E. 17.

91. **Taxation**—Income Tax.—One engaged in business of buying and selling intangible personalty was subject to taxation on gains derived therefrom under law as it was before adoption of income tax amendment to Const. Amend. 44—Trefry v. Putnam, Mass., 116 N. E. 904.

92.——Surplus.—In determining whether corporation is assessable as carrying on a business for profit, failure to pay dividends is not material where a surplus is being accumulated.—Spouting Rock Beach Ass'n v. Tax Com'rs of Rhode Island, R. I., 101 Atl. 215.

93.——Valuation.—Valuation of land for taxation is fixed by elements of value which lead to most profitable form of improvements.—Slatersville Finishing Co. v. Greene, R. I., 101 Atl. 226.

94. **Telegraphs and Telephones**—Regulation. —Act Cong. June 18, 1910, c. 309, conferring power on Interstate Commerce Commission to pass on reasonableness of regulations of interstate telegraph companies does not make such companies' regulations, establishing measure of their liability for negligent non-delivery of interstate messages, controlling until they are declared to be unreasonable by commission after complaint duly made.—Western Union Telegraph Co. v. Bailey, Tex., 196 S. W. 516.

95. **Tenancy in Common**—Husband and Wife. —Where life estate is devised to husband and wife as cotenants, and husband, after wife has deserted him, occupies the whole property a before, making no claim to additional rights and performing no act hostile to defendant's title except to secure a divorce and remarry, his possession was not adverse.—Doherty v. Russell, Me., 101 Atl. 305.

96. **Usury**—Extension.—Contract for extension of time of payment of note which provides means whereby payee might keep informed of condition of business of maker, held not necessarily usurious.—C. C. Slaughter Co. v. Eller, Tex., 196 S. W. 704.

97. **Waters and Water Courses**—Permissive Use.—Plaintiff cannot recover damages for closing a ditch on land of defendants, through which he claims prescriptive easement, where evidence shows that use of ditch was permissive in origin, and shows no distinct and positive assertion of a right hostile to owners of servient estate.—Williamson v. Abbott, S. C., 93 S. E. 15.

98. **Wills**—Caveat. — Caveator having any enforceable demand against an estate under an alleged contract to bequeath a child's part thereof could only recover upon a quantum meruit.—Harris v. Longino, Ga., 93 S. E. 29.

99.—Construction.—Where testator directed accumulation of $14,000 fund for production of income for surviving nephews and nieces, trustee could not appropriate income or any of principal of fund to payment of taxes or cost of insurance or repairs on building held by trustee for use of nephews and nieces so long as they remained unmarried.—Stamford Trust Co. v. Mack, Conn., 101 Atl. 235.

100.——Executed Agreement.—After executed agreement between grandchildren and others interested under the will as to the division of a residue, the grandchildren who received less thereunder than they would have received under the will, could not recover difference from executor or other heirs.—Kauffman v. Kauffman, Minn., 163 N. W. 780.